

[Cite as *State v. Bolton*, 2003-Ohio-3020.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81638

STATE OF OHIO	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
DAMON BOLTON	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT  
OF DECISION:

JUNE 12, 2003

CHARACTER OF PROCEEDING:

Criminal appeal from the  
Court of Common Pleas  
Case No. CR-421603

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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CUYAHOGA COUNTY PROSECUTOR  
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ANN DYKE, J. :

{¶1} Defendant-appellant Damon Bolton (“defendant”) appeals from the judgment of the trial court which denied his motion challenging the plaintiff-appellee State of Ohio’s (“State”) use of alleged race-based peremptory challenges. For the reasons set forth below, we affirm the decision of the trial court.

{¶2} The defendant was indicted on one count of drug trafficking and one count of tampering with evidence. The matter proceeded to a jury trial on June 24, 2002. The jury returned guilty verdicts on both counts and the trial court sentenced the defendant accordingly. The defendant challenges the state’s use of peremptory challenges to excuse two black jurors, leaving two black jurors on the panel. In his sole assignment of error on appeal, the defendant states:

{¶3} “I. The trial court erred in permitting the prosecutor to make peremptory challenges on the basis of race, thus denying the defendant his right to due process and equal protection.”

{¶4} It is a violation of the equal protection clause to exclude jurors on the basis of race. *Batson v. Kentucky* (1986), 476 U.S. 79. The defendant must present a prima facie case that the circumstances raise an inference of discrimination. *Id.*, *State v. Hernandez* (1992), 63 Ohio St.3d 577. Once the defendant establishes a prima facie case, the burden shifts to the state to articulate a racially neutral reason for excusing the venire member. *Id.* Once the prosecution advances a non-discriminatory reason, the trial court must decide whether the defendant carried his burden to prove purposeful discrimination. *Batson, supra; Hernandez, supra.*

{¶5} Only if the trial court determines, in its discretion, that the defendant has shown an inference of discrimination, does the burden shift to the prosecution to articulate a race neutral reason for excluding the prospective juror or jurors. *State v. Tillman* (1997), 119 Ohio App.3d 449. A prima facie case may be made by showing that members of a recognizable racial group were excluded and that other facts and circumstances raise an inference that the prosecutor excluded potential jurors on account of their race. *Batson, supra; Hernandez, supra*. The trial court should consider all of the relevant circumstances. *Batson, supra; Hicks v. Westinghouse Materials Co.* (1997), 78 Ohio St.3d 95.

{¶6} “For example, a ‘pattern’ of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor’s questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” *Batson*, 106 476 U.S. 79.

{¶7} The Supreme Court of Ohio has also stated:

{¶8} “The only issue in step two of the *Batson* analysis is whether the proponent gave a race-neutral explanation for his peremptory challenged. The ‘explanation need not rise to the level of justifying exercise of a challenge for cause.’ *Batson*, 476 U.S. at 97. See, also, *Purkett v. [Elm]* (1995)], 514 U.S. at 769. While a prospective juror’s answers may be sufficient to survive a challenge for cause, both prosecutors and defense attorneys must remain free to challenge on a peremptory basis jurors whose answers create overall

concerns on the subject at issue.” *State v. White* (1999), 85 Ohio St.3d 433. The *Batson* Court also noted that if the trial court determines that the prosecuting attorney has provided an explanation which is credible, that determination is entitled to great deference. *Id.*

{¶9} In this case, the defense suggested to the trial court that a juror, Mr. Lewis, was excused solely because he was black. In response to the defense’s suggestion, the State explained that they excused Juror Lewis based on the fact that the juror’s brother had been prosecuted for the exact same crime as was involved in this case. The State further explained that because the juror’s brother had a lengthy criminal record and his son had also been prosecuted, the State believed that he would not be a favorable juror to the State. Lastly, the State explained that Juror Lewis led the State to believe that it was his opinion that the laws regarding crack cocaine were discriminatory as compared to laws regarding powder cocaine in regard to sentencing<sup>1</sup>. The trial court considered the prosecution’s reasons for dismissing Juror Lewis and determined that the reasons presented were valid, neutral reasons for excusing Juror Lewis.

{¶10} The defense also questioned the State’s peremptory challenge of another black juror, Ms. Cook. The State explained that they exercised a peremptory challenge on Juror Cook because she told them that a close family member of hers had been prosecuted by the Cuyahoga County prosecutor’s office recently in connection with a homicide, in particular, obstruction of justice relating to the disposal of a body. The prosecutor, who was familiar with the case, recalled that it was an extremely contentious prosecution. The state explained that as a result of this experience, they questioned Juror

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<sup>1</sup>The defendant in this case was indicted for trafficking in crack-cocaine.

Cook's ability to remain fair and unbiased toward the prosecution and Cuyahoga County in any case, including this particular case.<sup>2</sup>

{¶11} After argument by both parties on the record, the trial court stated:

{¶12} "The record may reflect of course that the prosecutor's (sic) excused two white jurors and two Afro American jurors, the Court does not take these types of motions lightly. And if the Court believed that the prosecutor was excusing the jurors certainly because of any racial type of tendencies I would not permit the prosecutor to excuse any juror at this time, juror number eleven, Mrs. Cook. However, I believe, and I believe it has been done sincerely by the prosecutor that he has a racially neutral reason for excusing the juror in view of the criminal conviction of her grandson and as with juror number four, just happens that these two people have relatives that would give a prosecutor good racially neutral reason for excusing them\*\*\*(sic)" (T. 136).

{¶13} The defendant challenges the trial court's determination that the state's exercise of a peremptory challenge was proper. Specifically, the defendant complains that allowing a juror to be excused using a peremptory challenge solely because that juror's relative has been convicted of a crime is inherently discriminatory, in light of statistics which demonstrate that blacks are convicted of crimes at a substantially higher rate than whites. We decline to address the defendant's specific contention, however. While the trial court mentioned both juror's relatives as reasons for excusing the jurors in accepting the prosecutor's explanation, the record is clear in this case, that the specific facts giving rise

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<sup>2</sup>Ms. Cook had previously stated in voir dire that her son had been murdered twenty years ago, her daughter was murdered ten years ago, and her other son was acquitted of child molestation charges, however the prosecution did not cite these reasons to the trial court to support excusing her.

to each relative's prosecution supported a race-neutral peremptory challenge. That is, the jurors were not excused solely because they had relatives who had been convicted of a crime. Juror Lewis was excused because his brother committed the exact same crime as the one the defendant was being tried for and because Juror Lewis led the prosecutor to believe that his views on sentencing for crack cocaine were not favorable to the state's position. Further, Juror Cook was excused because of the particularly contentious nature of the prosecution between her grandson and the Cuyahoga County prosecutors office in connection with a very recent homicide investigation.

{¶14} In the third part of the *Batson* analysis, the court must decide whether the neutral explanation offered by the proponent of the strike is credible or instead is a "pretext" for unconstitutional discrimination. *State v. Gowdy* (2000), 88 Ohio St.3d 387, citing *Hernandez*, *supra*.

{¶15} As the United States Supreme Court noted in *Hernandez*:

{¶16} "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral-explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Id.* at 365.

{¶17} In this case, the trial court rejected the notion that the prosecutor's challenges were race-based. We agree with the trial court's determination that nothing in the prosecutor's explanation demonstrated an intent to exclude the juror on the basis of

race. We find that the prosecutor provided race-neutral explanations for excusing both Juror Lewis and Juror Cook. We cannot say that the trial court's determination was erroneous and therefore overrule this assignment of error.

Judgment affirmed.

FRANK D. CELEBREZZE, JR., J., CONCURS.

PATRICIA ANN BLACKMON, P.J., CONCURS.

(SEE ATTACHED CONCURRING OPINION)

ANN DYKE  
JUDGE

PATRICIA ANN BLACKMON, J., CONCURRING:

{¶18} I concur with the majority opinion and write separately to illuminate the problem raised in this appeal. This appeal examines *Batson v. Kentucky*'s<sup>3</sup> impact on the State's peremptory challenge of African-American jurors, when the State's reason for the challenge is based on the "relative exclusion." The "relative exclusion" exists when the State excludes a juror because of the criminal history of that juror's relative. Bolton argues this exclusion is flawed when the juror is African-American since there exist a substantial likelihood of an African-American juror having a relative with a criminal history. Bolton states according to the Justice Department in the year 2000, 7.5 million criminal arrests took place in U.S. and blacks who are 12.5% of the population constituted 28.5% of those 7.5 million criminal arrests.

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<sup>3</sup>(1986), 476 U.S. 79.

{¶19} Bolton argues because of this data the State must do more than rely on the "relative exclusion" in light of *Batson*. Here, the majority opinion concludes there is more. Juror Lewis' brother had committed the same crime as Bolton and had questioned the discriminatory sentencing of crack cocaine offenders versus powder cocaine offenders. Juror Cook's relative had been charged with obstructing justice; although the "criminal similarity" argument did not exist with Juror Cook, the prosecutor vaguely referenced that he recalled the case as highly contentious. The majority opinion concluded these reasons protected the State in the exclusion of these two African-Americans and shielded it from the ire of *Batson*.

{¶20} I agree with the majority opinion that these additions lend more credibility to the prosecutor's "relative exclusion" than if he had just said the jurors were excluded because of their relatives' criminal history. Consequently, I believe that this is not the factual case to fight this battle.